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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 756

DON McCULLAGH, INC., a Michigan corporation,
Appellant,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE,
Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

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REPORTS OF OPINIONS BELOW

The opinion of the Supreme Court of the State of Michigan is reported in 354 Michigan 413, and 93 N. W. (2d) 252, (1958). A copy of that opinion is attached hereto as

Appendix "A". The Wayne Circuit Court of the State of Michigan, the court of first instance, rendered an opinion which is not reported. A copy of that opinion is attached hereto as Appendix "B".

JURISDICTIONAL GROUNDS

1. This is an appeal from a decision of the Supreme Court of the State of Michigan. The appellant brought suit against the State of Michigan to recover moneys paid to that state, pursuant to Section 1 (b), Act 204, Mich. P. A., 1953, M. S. A. Supp. 7.521; Section 2, Act 272, Mich. P. A., 1949, M. S. A. 7.52; Section 2 (f), Act 203, Mich. P. A. 1953, M. S. A. Supp. 7.555 (2) (f); Section 3, Act 211, Mich. P. A., 1953, M. S. A. Supp. 7.555 (3), on the ground that said statutes were unconstitutional as being in conflict with the United States Constitution, Art. I, Sec. 8.

The statutes in controversy exempted from sales tax sales of tangible personal property for intrastate leasing for seven consecutive days or more, and subjected to sales tax sales of tangible personal property for interstate leasing for seven consecutive days or more. Said statutes further provided one method of taxation for sales for interstate leasing and leasing interstate, namely, a tax of 3% upon the sale price, payable at the time of sale, which, in this instance, resulted in a tax being imposed upon appellant in the sum of $7,694.97, and another method of taxation for sales for intrastate leasing and leasing intrastate, namely, a tax of 3% upon the rental receipts payable upon receipt thereof, which, in this instance, would have resulted in a total tax of $3,065.67, if the sale and lease had been a sale for intrastate leasing and leasing intrastate, instead of a sale for interstate leasing and leasing interstate.

2. The judgment of the Supreme Court of the State of Michigan was rendered and entered December 2, 1958. A motion for rehearing was denied by the Supreme Court of the State of Michigan on January 12, 1959.

A notice of appeal to this Court was filed by the appellant with the clerk of the Wayne Circuit Court of the State of Michigan, (that being the court possessed of the record) on February 6, 1959.

3. The jurisdiction of this Court upon appeal is conferred by 28 U. S. C. A., Section 1257 (2). Appellant challenges the validity of the statutes of the State of Michigan within the meaning of 28 U. S. C. A., Section 1257 (2), on the ground that as applied to appellant's activity in making sales for interstate leasing, said statutes are repugnant to the Constitution of the United States and the decision of the highest state court to which an appeal could have been taken was in favor of validity.

4. Cases believed to sustain the jurisdiction of this Court on appeal are:

Fiske v. Kansas, 274 U. S. 380 (1927);

Illinois, Ex Rel Vashti McCollum v. Board of Education of School District No. 71 et al., 333 U. S. 203 (1948);

James Stewart & Co. v. Sadrakula, 309 U. S. 94, (1940);

Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U. S. 157 (1954);

Sullivan v. Texas, 207 U. S. 416 (1908);

Western Turf Association v. Greenberg, 204 U. S. 359 (1907).

Section 1 (b), Act No. 204, Michigan Public Acts, 1953 (Michigan Statutes Annotated Supp. 7.521) provides:

> "When used in this act: * * *
>
> "(b) The term 'sale at retail' means any transaction by which is transferred for consideration the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any other purpose than for resale, or for lease when the rental receipts are taxable under Act No. 94 of the Public Acts of 1937, as amended, (being sections 205.91 to 205.111, inclusive, of the Compiled Laws of 1948), in the form of tangible personal property to a person licensed under this act."
>
> Michigan Public Acts, 1953, page 287.

Section 2, Act No. 272, Michigan Public Acts, 1949, (Michigan Statutes Annotated, 7.522) provides:

> "There is hereby levied upon and there shall be collected from all persons engaged in the business of making sales at retail, as hereinbefore defined, an annual tax for the privilege of engaging in such business equal to 3 per cent of the gross proceeds thereof, plus the penalty and interest when applicable as hereinafter provided, less deductions allowed in Sections 4 and 4a."
>
> Michigan Public Acts, 1949, page 386.

Sections 4 and 4a, referred to in the foregoing statute, although not under attack, are necessary for a full explanation of the foregoing statute and are set forth in Appendix "C".

Section 2 (f), Act No. 203, Michigan Public Acts, 1953 (Michigan Statutes Annotated Supp. 7.555 (2) (f), provides:

> "(f) 'Price' means the aggregate value in money of any thing, or things, paid or delivered, or promised to be paid or delivered by a consumer to a seller in the consummation and complete performance of the transaction by which tangible personal property shall have been purchased or rented for storage, use or other consumption in this state, without any deduction therefrom on account of the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever. The tax collected by the seller from the consumer or lessor under the provisions of this act shall not be considered as a part of the price, but shall be considered as a tax collection for the benefit of the state, and no person other than the state shall derive any benefit from the collection or payment of such tax. It is hereby provided that no tax is to be computed on rental receipts when the tangible personal property is rented or leased for a period that is less than 7 consecutive days, and in such instance, the lessor shall be deemed to be the consumer of the tangible personal property so rented."

Michigan Public Acts, 1953, page 284.

Section 3, Act No. 211, Michigan Public Acts, 1953, Michigan Statutes Annotated Supp. 7.555 (3) provides:

> "There is hereby levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing or consuming tangible personal property in this state after June 30, 1937, which tax shall be equal to 3% of the price of such property, and to such tax there shall be added penalties and interest when applicable as hereinafter provided. For the purpose of the

proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that tangible personal property purchased on or after June 30, 1937 by any person for delivery in this state is purchased for storage, use or other consumption in this state." * * *

Michigan Public Acts, 1953, page 307.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the Michigan Sales and Use Tax statutes, Section 1 (b), Act No. 204, Michigan Public Acts, 1953 (Michigan Statutes Annotated Supp. 7.521); Section 2, Act No. 272, Michigan Public Acts, 1949 (Michigan Statutes Annotated 7.522); Section 2 (f), Act No. 203, Michigan Public Acts, 1953 (Michigan Statutes Annotated Supp. 7.555 (2) (f)), Section 3, Act No. 211, Michigan Public Acts, 1953 (Michigan Statutes Annotated Supp. 7.555 (3)), which exempt from a 3% sales tax the sale of tangible personal property for intrastate leasing for seven consecutive days or more, and subject Don McCullagh, Inc., appellant, to said sales tax in the sum of $7,694.97, upon the sale of 154 new automobiles, licensed and titled in Florida, to General Car Leasing, a Michigan corporation, for interstate leasing to Couture Motor Corporation, a Florida corporation, for more than seven consecutive days, for use in its rent-a-car business in Miami, Florida, which sale would have been exempt from sales taxes if Couture Motor Corporation had used said automobiles in Michigan, instead of Florida, is in violation of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3, in that it unduly burdens interstate commerce, exposes interstate commerce to multiple burdens and discriminates against interstate commerce.

2. Whether said Sales and Use Tax statutes violate the Commerce Clause in imposing one method of taxation upon sales for intrastate leasing and leasing intrastate, namely, exemption from sales taxes and a tax of 3% upon the rental receipts which, in this case, would have resulted in a total tax of $3,065.67, if the lease had been performed in Michigan rather than Florida, and another method of taxation upon sales for interstate leasing and leasing interstate, namely, a sales tax upon the sale price, which in this case resulted in a tax of $7,694.97, nothwithstanding that the state of use could impose a further tax upon the rental receipts.

STATEMENT OF CASE

The declaration filed in this cause alleges that appellant seeks to recover moneys paid to the State of Michigan, levied under the Sales and Use Tax statutes upon the ground that said statutes are in conflict with the Commerce Clause of the United States Constitution. Appellee filed an answer denying that said statutes were in conflict with the Commerce Clause of the United States Constitution. The facts were stipulated by the parties.

Appellant filed a motion for a summary judgment based upon the stipulated facts. The Wayne Circuit Court, the court of first instance, in a carefully considered opinion, summarized the stipulated facts and issues as follows:

> "This cause comes before the Court upon plaintiff's motion for a summary judgment against the defendant for recovery of sales taxes and interest thereon assessed by the defendant.
>
> "The facts are not in dispute and are substantially as follows. Plaintiff, a Michigan corporation, duly licensed to engage in the automobile business, sold to General Car Leasing, a Michigan corpora-

tion, duly licensed to engage in the business of leasing automobiles 154 new automobiles beginning January 14, 1954 and ending June 28, 1954. General Car Leasing purchased said automobiles to perform a certain lease which it entered into with Couture Motor Corporation of Miami, Florida, on January 12, 1954. Couture Motor Corporation engaged Williams Rent-a-Car in Detroit, Michigan, to obtain drivers for said automobiles to deliver said automobiles from Detroit, Michigan to Couture Motor Corporation's place of business in Miami, Florida. Williams Rent-a-Car, by means of advertising, procured the drivers who drove said automobiles to Couture Motor Corporation in Miami, Florida. The drivers procured by Williams Rent-a-Car were directed to obtain and did obtain automobiles at plaintiff's place of business, in Detroit, Michigan, which they drove to Couture Motor Corporation in Miami, Florida. Plaintiff billed said automobiles to General Car Leasing Company, c/o Couture Motor Corporation, Miami, Florida. Said automobiles were never licensed and titled in the State of Michigan and were licensed and titled in the State of Florida in the name of General Car Leasing. General Car Leasing paid plaintiff for said automobiles $256,519.10.

"Couture Motor Corporation used said automobiles in its rent-a-car business which it conducted in Miami, Florida. It paid General Car Leasing $55 per month for each automobile and during the term of the lease paid General Car Leasing a total of $102,189.10. The rental for said automobiles commenced five days after each automobile left Detroit, Michigan. All of said automobiles were leased by General Car Leasing to Couture Motor Corporation for more than seven consecutive days. On December 19, 1956 defendant assessed and plaintiff paid upon the foregoing transaction sales taxes in the sum of $7,694.97 and interest thereon in the amount of $860.78, a total of $8,555.75.

"On February 13, 1957 plaintiff commenced this action to recover said payment with interest at six per cent from the date of payment, which is authorized by Section 7.543, Statutes Annotated, alleging that said assessment was repugnant to the Constitution of the United States and particularly the Commerce Clause.

"Under the state sales tax act a sale for leasing, when the rental receipts are taxable as provided in the use tax act, is exempt from the sales taxes. Statutes Annotated, 7.521. The use tax act provides a use tax of three per cent upon the rental receipts derived from the rental of tangible personal property for seven consecutive days or more. Statutes Annotated, 7.555.

"Defendant contends that, since General Car Leasing was not taxable upon the rental receipts, plaintiff is liable for the sales taxes as assessed in this case. Plaintiff contends that the sales taxes, as herein imposed, discriminate against interstate commerce and also expose interstate commerce to multiple burden and are, therefore, unconstitutional, being in violation of the Commerce Clause. The law is settled that a state may not expose interstate commerce to multiple burden to which intrastate commerce is not exposed, nor may it discriminate against interstate commerce. The issue in the instant case is whether or not interstate commerce is thus exposed to multiple burdens or whether it is discriminated against. If it is, plaintiff is entitled to a judgment as prayed for" (Appendix "B").

The Wayne Circuit Court resolved the issues in favor of appellant as follows:

"The question to be determined is whether or not, under the facts of this case, interstate commerce is exposed to multiple burdens to which in-

trastate commerce is not exposed, or discriminated against.

"A sale in Michigan for leasing in the State of Michigan, under the same circumstances as in the instant case, would not be subject to sales tax. A sale in Michigan for leasing beyond Michigan is subject to a sales tax under the act. Thus a sale in Michigan for intrastate leasing is exempt from sales taxes and the same sale for interstate leasing is taxable. Plainly interstate commerce is discriminated against. A sale where interstate commerce follows is taxable. The same sale where intrastate commerce follows is not taxable. It, therefore, can not be argued that interstate commerce is not discriminated against. * * *

"The tax imposed in this case is also discriminatory in another manner. The State in this instance imposed a tax of $7,694.97. Had the lease been performed in Michigan the use tax upon rental receipts would have been $3,065.67. Thus a tax is here imposed in the sum of $7,694.97 (subject also to a Florida use tax, if any) because interstate commerce followed the sale, while the tax would have been only $3,065.67 if intrastate commerce had followed the sale. Here again interstate commerce is discriminated against in favor of intrastate commerce" (Appendix "B").

A full summary judgment was entered in the Wayne Circuit Court in favor of appellant. Appellee appealed to the Michigan Supreme Court, and that Court held that the tax here imposed was not in conflict with the Commerce Clause of the United States Constitution, and that interstate commerce was not discriminated against or exposed to multiple burdens. It reversed the Wayne Circuit Court and ordered the judgment entered in favor of appellant to be set aside and that a judgment be entered in favor of appellee (Appendix "A").

RAISING THE FEDERAL QUESTIONS BELOW

The fact that the Federal questions were adequately and properly raised was recognized by the Supreme Court of Michigan in its opinion. It said:

> "In its declaration plaintiff alleged that the assessing and collecting of said tax operated to place an undue burden upon interstate commerce, such claim being based on the fact that a provision of the sales tax act of this State, in force at the time of the transactions in question, required the payment of the tax on the sale of tangible personal property to one leasing for seven days or more in a State other than Michigan, while exempting therefrom a sale made for leasing intrastate if rentals under the lease were subject to the Michigan use tax act, hereafter cited. Defendant by answer denied the right of plaintiff to recover, impliedly challenging the correctness of plaintiff's conclusions of law by averring that its claim was without merit. The trial judge, hearing the matter on plaintiff's motion for summary judgment, agreed with plaintiff's claim that the provision of the statute relating to a tax on sales made for leasing and consequent use of the tangible personal property sold, outside of the State, placed an undue burden on interstate commerce in view of the fact that such sales made for leasing in Michigan under circumstances requiring the payment of the use tax to this State were exempt from the sales tax. Judgment was entered accordingly, and defendant has appealed."

This Court will accept the recognition by the state court that the Federal questions were properly raised in that court.

> *Charleston Federal Savings and Loan Association v. Alderson,* 324 U. S. 182 (1945).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The trial court, in its carefully considered opinion, said:

> "The United States Supreme Court on many occasions has held that any form of state taxation or regulation, whether forthright or ingenious, which exposes interstate commerce to multiple burdens or discrimination to which intrastate commerce is not exposed, is a violation of the Commerce Clause. *McLeod v. Dillworth*, 322 U. S. 327; *J. D. Adams Manufacturing Co. v. Storen*, 304 U. S. 307; *Gwin, White and Prince v. Henneford*, 305 U. S. 434; *Michigan, Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157; *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U. S. 389; *Nippert v. Richmond*, 327 U. S. 416; *Best & Co. v. Maxwell*, 311 U. S. 454; *Hale v. Bimco Trading Co.*, 306 U. S. 375; *I. M. Darnell Co. v. Memphis*, 208 U. S. 113; *Walling v. Michigan*, 116 U. S. 446; *Webber v. Virginia*, 103 U. S. 344; *Guy v. City of Baltimore*, 100 U. S. 434; *Walton v. Missouri*, 91 U. S. 275."

Is interstate commerce, under the facts of this case, exposed to multiple burdens or is it discriminated against. The trial court held that the question must be answered in the affirmative. Sales for intrastate leasing are exempt from sales tax—sales for interstate leasing are subject to sales tax. This is a flagrant discrimination. It was so held in *Jackson Mining Co. v. Auditor General*, 32 Mich. 488 (1875).

In *Jackson Mining Co. v. Auditor General*, 32 Mich. 488, Justice Cooley held a Michigan statute to be in conflict with the Commerce Clause which imposed a tax of 1½¢ per ton upon ore mined, and exempted from such taxation ore mined which was reduced or smelted within the State of Michigan.

The tax here imposed was $7,694.97, and it would have been $3,065.67, if the lease had been in intrastate com-

merce instead of interstate commerce. This, likewise, is a flagrant discrimination against interstate commerce. Further, the state of leasing may impose a tax upon the rental receipts derived from the rental of tangible personal property within the state and thus expose interstate commerce to further discrimination.

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62 (1939);
General Trading Co. v. Iowa, 322 U. S. 335 (1944);
Henneford v. Silas Mason Co., 300 U. S. 577 (1937).

Many jurisdictions do, in fact, tax the rental receipts derived from the rental of tangible personal property.

CCH All State Sales Tax Reporter indicates that the following jurisdictions impose a tax upon rental receipts derived from tangible personal property:

Arizona .....Section 4-325.075
Georgia .....Section 4-325.15
Indiana .....Section 4-325.19
Louisiana .....Section 4-325.23
Mississippi .....Section 4-325.29
New Mexico .....Section 4-325.36
New York City.....Section 4-325.38
North Carolina .....Section 4-325.39
North Dakota .....Section 4-325.40
Ohio .....Section 4-325.41
Oklahoma .....Section 4-325.42
Rhode Island .....Section 4-325.45
South Carolina .....Section 4-325.465
Tennessee .....Section 4-325.48
West Virginia .....Section 4-325.54
Wyoming .....Section 4-325.56.

The fact that Florida in this instance did not tax rental receipts is of no consequence. The power of state taxation is not dependent upon which state exercises it first. A statute which exposes interstate commerce to multiple burdens is not permitted by the Commerce Clause.

> *Gwin, White & Prince v. Henneford*, 305 U. S. 434 (1939);
> *J. D. Adams Manufacturing Co. v. Storen*, 304 U. S. 307 (1938);
> *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 (1954).

In the foregoing cases, this Court held that the test as to whether or not interstate commerce was exposed to multiple burdens was not whether it was in fact actually exposed to such burdens, but whether it could be exposed to the risk of multiple burdens.

The Supreme Court of Michigan, in its opinion, recognized the fact that interstate commerce was actually discriminated against in this case. It attempted to justify the discrimination upon the grounds that the Sales and Use Tax statutes were complementary to one another, and the tax which was 2½ times that which would have been imposed if the lease had been intrastate instead of interstate, was fair and just. It said.

> "The sales tax act and the use tax act are complementary. Their relation is such as to require recognition in each of the provisions and operation of the other. As before suggested, the Michigan legislature has acted accordingly in the attempt to work out a fair and just system. Mechanically a perfect result may not be obtained in all instances. In the case at bar the amount of the sales tax paid by plaintiff exceeds what the use tax would have been had it been payable in Michigan. It is con-

> ceivable, however, that under the same sort of transaction as is here involved such condition might well be reversed."

It is conceivable that the tax upon rental receipts could be much less than they are in the instant case. Leasing is not for one year in all cases. If the lease in this case had been for a week, the tax, nevertheless, would have been $7,694.97, and the tax upon the rental receipts would have been negligible.

This Court, in *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U. S. 390 (1957), held that an ordinance which imposed a flat sum license tax upon wholesale grocers soliciting orders and delivering said orders from outside of the state to the City of Opelika, Alabama, and taxed local merchants on a graduated gross receipt tax violated the Commerce Clause.

This Court has held that in determining whether or not the Commerce Clause has been violated, it will determine each case upon its practical effect upon interstate commerce, and that it will not be governed by the form or name of the tax in determining whether interstate commerce has been discriminated against.

In *Best & Co. v. Maxwell*, 311 U. S. 454 (1940), this Court held that a North Carolina statute which imposed a license tax of $250.00 upon one selling by sample in a hotel room which exempted regularly licensed merchants of North Carolina from said tax who paid a dollar license fee to engage in business, violated the Commerce Clause. In so holding, this Court said, at page 455:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case, it is our duty to determine whether the statute under attack, whatever its name may be, will in its prac-

tical operation work discrimination against interstate commerce. This standard we think condemns the tax at bar."

The authorities cited by the trial court fully support the conclusion reached by it that the statutes here in question and as here applied discriminate against interstate commerce, in violation of the Commerce Clause.

In *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389 (1952), this Court held a Mississippi statute to be in violation of the Commerce Clause which imposed a tax of $50.00 per truck upon trucks of firms not licensed to engage in the laundry business in the state, and a tax of $8.00 per truck upon local merchants licensed to engage in the laundry business in the State of Mississippi. In so holding, this Court said, at page 394:

> "The $50 per truck tax is applicable only to vehicles used by a person 'soliciting business for a laundry *not licensed in this state as such.*' (Emphasis supplied.) Laundries licensed in Mississippi pay a fixed fee to the municipality in which located, plus a tax of $8 per truck upon each truck used in other municipalities. As a result, if appellant 'solicits' business in a Mississippi municipality, it must pay a tax of $50 per truck while a competitor located in another Mississippi locality must pay a tax of only $8 per truck. The 'peddler' cases are inapposite under such a showing of discrimination since they support state taxation only where no discrimination against interstate commerce appears either upon the face of the tax laws or in their practical operation.
>
> "To sum up, we hold that the tax before us infringes the Commerce Clause under either interpretation of the operating incidence of the tax. The Commerce Clause created the nation-wide area of free trade essential to this country's eco-

nomic welfare by removing state lines as impediments to intercourse between the states. The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause."

In *Walling v. Michigan*, 116 U. S. 446 (1886), reversing 53 Mich. 264, a Michigan statute which imposed a license tax upon the agents of out-state manufacturers and dealers of liquor, from which the agents of local dealers and manufacturers were exempt, was held to be in violation of the Commerce Clause.

In *Webber v. Virginia*, 103 U. S. 344 (1881), and *Welton v. Missouri*, 91 U. S. 275 (1876), it was held that the imposition of a license tax upon vendors of out-state products, which was not imposed upon the vendors of local manufactured products, violated the Commerce Clause.

In *I. M. Darnell & Co. v. Memphis*, 208 U. S. 113 (1908), it was held that the exemption from *ad valorem* taxation of the products of the soil of Tennessee in the hands of producers and their immediate vendees, and subjecting the same property to taxation which was the product of the soil of other states, violated the Commerce Clause.

In *Guy v. The City of Baltimore*, 100 U. S. 434 (1880), an ordinance which imposed wharfage fees for use of the wharves by vessels carrying the products of states other than Maryland, and exempting vessels carrying the products of Maryland from said wharfage fees was in violation of the Commerce Clause.

It should be noted that Sections 4 and 4a, of the Sales Tax Act (Appendix "C"), exempt from the sales tax in question, among others, sales for resale, industrial processing and agricultural consumption. Said exemptions are not limited to said uses within the State of Michigan.

Sales for resale, industrial processing and agricultural consumption are exempt wherever said use takes place. If the decision of the Michigan Supreme Court is upheld, then the State of Michigan and any other state could limit exemptions from such taxation to such exempted use within the state. Interstate commerce most certainly is discriminated against under such circumstances. The Commerce Clause is not as meaningless as held in this case by the Michigan Supreme Court, for if such were the law. every state boundary would be a barrier to national trade, which the Commerce Clause was designed to prevent.

The impact of such discriminatory taxes upon national commerce is plainly apparent. Appellant and all other Michigan automobile dealers cannot compete for sales for interstate leasing with dealers in other states. Interstate lessees will, of necessity, be required to pay a greater rental to pick up the sales tax paid in Michigan, and they may also be subjected to a tax upon the rental receipts in the state of use, if said state or its municipalities impose such a tax. Under such circumstances, Michigan lessors of tangible personal property could not compete with the lessors of such property in other states. The decision of the Supreme Court of Michigan should not be permitted to stand in open defiance of the repeated pronouncements of this Court.

THIS CASE IS WITHIN THE JURISDICTIONAL PROVISIONS RELIED ON AND THE CASES CITED TO SUSTAIN JURISDICTION

This appeal is taken pursuant to 28 U. S. C. A., Section 1257 (2), which confers appellate jurisdiction upon this Court to review final judgments rendered by the highest state court in which a decision could be had when there is drawn in question the validity of a state statute on the ground of it being repugnant to the United States Constitution, and the decision of the state court is in favor of validity.

The Michigan Supreme Court, in its opinion, recognized that it upheld the validity of the statutes here in question. It said:

> "The question before us is whether the provision of the Michigan sales tax act here involved is open to the objection that it necessitates discrimination against interstate commerce in the objectional sense of the term, and is therefore invalid. We think that such question must be resolved in favor of the validity of such provision."

There can be no question that the judgment of the Supreme Court of Michigan, is a final judgment. The judgment in favor of appellant is vacated, and judgment in favor of the appellee has been entered.

CONCLUSION

Appellant respectfully suggests that this appeal brings before the Court Federal questions under the United States Constitution which are far-reaching and important in terms of legal principles and practical impact on the taxation of interstate activities, and the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for the resolution.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF MICHIGAN

(Title Omitted)

OPINION OF THE SUPREME COURT OF THE STATE OF MICHIGAN

December 2, 1958

Before the Entire Bench, except Kavanagh, J.

Carr, J.

The parties to this case have entered into a stipulation as to the material facts. It appears therefrom that the plaintiff, a Michigan corporation with its offices in the city of Detroit, was at the time of the occurrences out of which the case has arisen engaged in the sale of automobiles at retail, possessing a sales tax license issued by the State. During the period from January 14, 1954, to and including June 28th of the same year, it sold to General Car Leasing, Inc., 154 automobiles for a total consideration of $256,519.10. Prior to such purchases and under date of January 12, 1954, the purchaser had entered into a contract for the leasing of automobiles to Couture Motor Corporation, a Florida corporation engaged in renting automobiles and having its principal place of business at Miami in that State. The lease as originally made provided for the furnishing by General Car Leasing, Inc., of 50 new automobiles. Thereafter it was modified to include additional cars to the total number above indicated. The automobiles were taken to Florida by persons hired for that purpose, the drivers receiving the vehicles at plaintiff's place of business.

The leasing contract in question was for a period of one year with a right to lease the vehicles from year to year unless the agreement was terminated by written notice. The rental was payable monthly, the aggregate amount so paid being $102,189.10. All of the vehicles leased were licensed and titled in the State of Florida in the name of General Car Leasing, Inc. The department of revenue of the State took the position that plaintiff was liable for the payment of a tax on the sale of the cars to General Car Leasing, Inc., in the sum of $7,694.97. Said amount, together with interest in the sum of $860.78, was paid by plaintiff on December 19, 1956. Thereafter the present action was instituted in the circuit court of Wayne county to recover the sum so paid, with interest thereon.

In its declaration plaintiff alleged that the assessing and collecting of said tax operated to place an undue burden upon interstate commerce, such claim being based on the fact that a provision of the sales tax act of this State, in force at the time of the transactions in question, required the payment of the tax on the sale of tangible personal property to one leasing for seven days or more in a State other than Michigan, while exempting therefrom a sale made for leasing intrastate if rentals under the lease were subject to the Michigan use tax act, hereafter cited. Defendant by answer denied the right of plaintiff to recover, impliedly challenging the correctness of plaintiff's conclusions of law by averring that its claim was without merit. The trial judge, hearing the matter on plaintiff's motion for summary judgment, agreed with plaintiff's claim that the provision of the statute relating to a tax on sales made for leasing and consequent use of the tangible personal property sold, outside of the State, placed an undue burden on interstate commerce in view of the fact that such sales made for leasing in Michigan

under circumstances requiring the payment of the use tax to this State were exempt from the sales tax. Judgment was entered accordingly, and defendant has appealed.

Section 1 of the Michigan sales tax act*, as amended by P. A. 1953, No. 204 (C. L. S. 1954, §205.51 [Stat. Ann. Cum. Supp. §7.521]), in effect at the time of the transactions involved in this case, set forth the provision, claimed by plaintiff to be invalid, as follows:

> "(b) The term 'sale at retail' means any transaction by which is transferred for consideration the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any other purpose than for resale, or for lease when the rental receipts are taxable under Act No. 94 of the Public Acts of 1937, as amended, in the form of tangible personal property to a person licensed under this act, * * *."

The enactment referred to in the language quoted is commonly cited as the Michigan use tax act.** Said act exempts from the payment of the tax provided for thereby the use, storage or consumption, of tangible personal property sold in the State if a sales tax has been paid on the transaction. A like exemption is provided for in instances in which the State is prohibited from taxing under the State Constitution or the Constitution or laws of the United States, and also if the sale or use of the property involved has been subjected in another jurisdiction to a sales tax or use tax equal to or in excess of the Michigan tax, such exemption being subject to a reciprocity clause.

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*P. A. 1933, No. 167, as amended (C. L. 1948, §205.51 *et seq.*, as amended [Stat. Ann. and Stat. Ann. 1957 Cum. Supp. §7.521 *et seq.*]).

** P. A. 1937, No. 94, as amended (C. L. 1948, §205.91 *et seq.*, as amended [Stat. Ann. and Stat. Ann. Cum. Supp. §7.555(1) *et seq.*]).

For obvious reasons this State is not entitled to a tax on the use in Florida of the leased automobiles. It does not appear that at the time of such use the latter State had by statute provided for such a tax. It does appear that the transaction out of which this case has arisen did not actually involve the payment of sales tax and also a use tax. On behalf of plaintiff, however, it is contended that because the State of Florida may impose such an exaction interstate commerce is exposed to multiple burdens in violation of the pertinent provision of the Federal Constitution. The circuit judge agreed with such claim, also pointing out that in the instant case the amount of the sales tax was materially higher than would have been imposed under the use tax act had the sale by plaintiff been made for leasing the automobiles for use in Michigan.

The basic question involved in the case is whether the provision of the sales tax act of Michigan, above quoted, discriminates in the obnoxious sense of the term against interstate commerce. As noted, plaintiff's claim in this respect is based on the exemption from the payment of the tax if the sale is made for leasing and use in Michigan so that the rental receipts are taxable under the use tax act. Concedely a State may not impose a tax on interstate commerce, nor may it enforce legislation resulting in unjust discrimination. In determining whether such discrimination obtains by virtue of the legislative enactment here in question consideration may properly be given to the fact that the sales tax act and the use tax act are closely related, to such an extent that each may be said to be complementary to the other. Each is designed to raise revenue from taxation of the privilege of engaging in certain business transactions. That the legislature in the enactment of said statutes, and subsequent amendments

thereto, had in mind the practical situation presented is obvious. The provision of the sales tax act here involved is an expression of such recognition, indicating that the general policy of the State was not to impose a double burden on the bases of the taxes provided for by said acts.

This Court has previously recognized that the sales tax act and the use tax act are related and complementary. In *Banner Laundering Co. v. State Board of Tax Administration,* 297 Mich. 419, in which the validity of the use tax act was sustained, it was said:

> "In support of their contention that the use tax act 'is discriminatory in terms,' appellants advert to the fact that the act in section 4 provides numerous exemptions, including the following: (1) Property merged into the common mass which was not acquired *at retail sale* in the State of purchase, (2) property upon which a retail sales tax was paid in the State of purchase, (3) a great mass of property which, after merger, is devoted to industrial processing, to agricultural producing, or to be resold. But nowhere in appellants' brief is it persuasively pointed out that the exemptions contained in the statute are not justifiable exemptions, or that in consequence of the exemptions the act is rendered unconstitutional in that it does not operate uniformly or that it deprives appellants or others like situated of due process or equal protection of the law. Instead we think it is plain, at least the contrary is not demonstrated by appellants, that certain of the exemptions contained in the statute are justified by an obvious attempt on the part of the legislature to produce uniformity in the taxation imposed by the use tax act when considered in connection with the closely related sales tax act. Other exemptions contained in section 4 of the act are of a type frequently embodied in taxation statutes, such as property sold to governmental units for public use, property sold

to religious organizations, benevolent, charitable, scientific institutions and the like. But exemptions which render the operation of a taxation measure more just and uniform, or save institutions of the character above noted from the burden of the particular tax, do not render the act invalid for lack of uniformity or deprive persons subject to the tax of due process or equal protection of law, and this is true both of a specific tax and of a direct property tax."

Citing the above case, among other prior decisions of the Court, it was said in *Western Electric Co. v. Department of Revenue*, 312 Mich. 582:

"The essential elements of the use tax and the underlying principles of taxation on which it is based distinguish it from the tax imposed by Act No. 179, Pub. Acts 1899. The use tax was enacted for the purpose of levying and collecting a specific tax for the privilege of using, storing or consuming tangible personal property. *Goebel Brewing Co. v. State Board of Tax Administration*, 306 Mich. 222. It is complementary to the sales tax (Act No. 167, Pub. Acts 1933, as amended [Comp. Laws Supp. 1940, §3663-1 *et seq.*, Stat. Ann. §7.521 *et seq.*]). Property, the sale of which is subjected to the sales tax, is exempted from payment of the use tax (Act No. 94, §4, Pub. Acts 1937 [Comp. Laws Supp. 1940, §3663-44, Stat. Ann. 1944 Cum. Supp. §7.555(4)])."

In *Kress v. Department of Revenue*, 322 Mich. 590, a like conclusion was reached as to the relation between the two acts in question and the fact that they are complementary. It is also recognized in other States having such statutes that this is the situation. In *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, the relation between the Iowa statutes providing for sales taxes and use taxes was so characterized. In sustaining the State statute

against the claim that its operation resulted in certain discriminations against interstate commerce, it was said:

> "Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem."

With reference to the power of a State legislature to make reasonable classifications, the decision of the United States supreme court in *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322, is significant. In sustaining the statute of Michigan providing for taxation of telephone companies and making certain classifications therein, it was said in part, after citing a number of prior decisions:

> "To these cases may be added others. They illustrate the power of the legislature of the State over the subjects of taxation and the range of discrimination which may be exercised in classifying those subjects when not obviously exercised in a spirit of prejudice and favoritism. *Cook v. Marshall County*, 196 U. S. 261, 274; *Missouri v. Dockery*, 191 U. S. 165. The cases decided subsequent to the decision in *Bell's Gap Railroad Co. v. Pennsylvania*, have applied its principle to many varying instances. Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. *Keeney v. New York*, 222 U. S. 525, 536. The State is not bound by any rigid equality. This is the rule;—its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.' See 223 U. S. 59, 62, 63. Thus defined and thus limited, it is a vital principle, giving to the Gov-

> ernment freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burdens and permitting it to make those 'discriminations which the best interests of society require.'"

Th courts throughout the country, including the United States supreme court, have been called on repeatedly to determine controversies involving claims of discrimination in taxation. The above cited decisions suggest the general principles applicable in such cases. The same principles are involved when it is asserted that the carrying out of State statutes results in undue discrimination against interstate commerce. In *General American Tank Car Corporation, et al., v. Day*, 270 U. S. 367, the plaintiffs brought suit to enjoin the defendant, a tax collector for one of the State parishes, from seizing property to satisfy a tax assessed on rolling stock owned by plaintiffs and operating over railroads in Louisiana. Plaintiffs were corporations organized in States other than Louisiana and not domiciled or licensed to do business therein. They used tank cars within the State for the transportation of oil in interstate commerce. The statute of the State authorized an assessment of 25 mills on the dollar of assessed valuation of rolling stock of nonresident corporations operated therein. It was the claim of the plaintiffs that said tax, which was designed to impose a burden on property of nonresidents in lieu of local taxes assessed in the several parishes of the State on property of persons or corporations domiciled therein, was invalid because discriminatory. It appeared that in some parishes local taxes exceeded the amount of the tax of which the plaintiffs complained, and in other parishes local taxes were less. Commenting on the situation the court, in upholding the State statute, said in part:

> "Such a classification is not necessarily discriminatory. *Travelers' Insurance Co. v. Connecticut*,

185 U. S. 364. Where the statute imposing a tax which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against nonresident taxpayers, and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. In determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary. *Travellers' Insurance Co. v. Connecticut, supra;* and see *State Railroad Tax Cases,* 92 U. S. 575, 612; *Shaffer v. Carter,* 252 U. S. 37, 56."

The above case was cited in *Gregg Dyeing Co. v. Query,* 286 U. S. 472. There the plaintiffs challenged the constitutionality of a statute of South Carolina imposing a tax on gasoline brought into the State in interstate commerce and stored therein for use. In upholding the statute, it was said:

"Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries. *Shaffer v. Carter,* 252 U. S. 37, 55. Appellants' attack upon the tax comes to this, in the last analysis, that the tax in their case is laid with respect to the gasoline they have bought outside the State and keep in storage for use and consumption in their business, whereas others are taxed, not with respect to the gasoline they keep in store for use and consumption, but for the gasoline they use and consume. But appellants have admitted, as the state court has said, that 'the only kind of storage affected' is that for the purpose of use and consumption. In this view the state court found no distinction of substance with respect to the practical opera-

> tion of the taxing statutes *in pari materia*, as all in like case, appellants and others who use gasoline in their business enterprises, pay the same amount on the gasoline they consume. Appellants had the burden of showing an injurious discrimination against them because they bought their gasoline outside the State. This burden they have not sustained. They have failed to show that whatever distinction there existed in form, there was any substantial discrimination in fact."

Of like import are *Henneford v. Silas Mason Co.*, 300 U. S. 577, and *Southern Pacific Co. v. Gallagher*, 306 U. S. 167. See, also, *General Trading Co. v. State Tax Commission*, 322 U. S. 335.

In the case at bar it is apparent that the legislature in the enactment of the sales tax act and use tax act, and numerous amendments thereto, has sought to avoid the burden of both taxes being imposed on the same business transaction. The exemptions in each of said statutes clearly indicate such purpose. An intent is manifest to reach an equitable basis for the assessment and collection of taxes essential in the raising of revenue for public purposes. As before noted, the State of Florida did not at the time of the transactions involved in this case impose a use tax on property brought into the State from beyond its borders. Many States having use tax statutes like Michigan exempt therefrom the use of property on the sale of which a tax has been collected in another State. What the policy of Florida might be in such regard is beside the question here involved. Neither are we concerned whether such a tax, if imposed, would be open to the objection that it discriminated against interstate commerce.

The question before us is whether the provision of the Michigan sales tax act here involved is open to the ob-

jection that it necessitates discrimination against interstate commerce in the objectional sense of the term, and is therefore invalid. We think that such question must be resolved in favor of the validity of such provision. It may not be said that the legislature of the State has exercised its authority in such manner as to establish clear and hostile discrimination against interstate commerce, or those engaged therein. The sales tax act and the use tax act are complementary. Their relation is such as to require recognition in each of the provisions and operation of the other. As before suggested, the Michigan legislature has acted accordingly in the attempt to work out a fair and just system. Mechanically a perfect result may not be obtained in all instances. In the case at bar the amount of the sales tax paid by plaintiff exceeds what the use tax would have been had it been payable in Michigan. It is conceivable, however, that under the same sort of transaction as is here involved such condition might well be reversed. It is questionable if any tax law could be devised that would result in absolute equality under all circumstances. Under general principles applicable to a case of this nature it must be said that plaintiff has failed to establish the alleged discriminatory character of the tax paid by it, or that it has been unfairly aggrieved thereby. The exemption from the tax as to intrastate sales for leasing use in this State involving payment of the use tax on rentals is not arbitrary or capricious in character. The provision of the sales tax act involved is not invalid on the ground that it imposes an unfair burden on interstate commerce.

Appellant has questioned the right of plaintiff to challenge the validity of the statutory provision in question on the ground that it is not engaged in interstate commerce. However, the basic proposition at issue is the

matter of discrimination, and the legal incidence of the sales tax falls on the retailer of personal property. *Federal Reserve Bank of Chicago v. Department of Revenue*, 339 Mich. 587, *National Bank of Detroit v. Department of Revenue*, 340 Mich. 573; *United States v. City of Detroit*, 345 Mich. 601. Plaintiff paid the tax of which it now complains, and should be permitted to urge in court the invalidity of the statute requiring such payment. It is entitled to a determination on the merits. It does not appear that any person or corporation other than plaintiff can claim to have been prejudiced by the collection of said tax.

An order will enter remanding the case to the trial court with directions to set aside the judgment in plaintiffs' favor and to enter judgment for defendant.

APPENDIX "B"

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE, MICHIGAN

(Title Omitted)

OPINION OF THE COURT ORDERING JUDGMENT FOR PLAINTIFF

January 14, 1958

This cause comes before the court upon plaintiff's motion for a summary judgment against the defendant for recovery of sales taxes and interest thereon assessed by the defendant.

The facts are not in dispute and are substantially as follows. Plaintiff, a Michigan corporation, duly licensed to engage in the automobile business, sold to General Car Leasing, a Michigan corporation, duly licensed to engage in the business of leasing automobiles 154 new automobiles beginning January 14, 1954 and ending June 28, 1954. General Car Leasing purchased said automobiles to perform a certain lease which it entered into with Couture Motor Corporation of Miami, Florida, on January 12, 1954. Couture Motor Corporation engaged Williams Rent-a-Car in Detroit, Michigan, to obtain drivers for said automobiles to deliver said automobiles from Detroit, Michigan to Couture Motor Corporation's place of business in Miami, Florida. Williams Rent-a-Car, by means of advertising, procured the drivers who drove said automobiles to Couture Motor Corporation in Miami, Florida. The drivers procured by Williams Rent-a-Car were di-

rected to obtain and did obtain automobiles at plaintiff's place of business, in Detroit, Michigan, which they drove to Couture Motor Corporation in Miami, Florida. Plaintiff billed said automobiles to General Car Leasing Company, c/o Couture Motor Corporation, Miami, Florida. Said automobiles were never licensed and titled in the State of Michigan and were licensed and titled in the State of Florida in the name of General Car Leasing. General Car Leasing paid plaintiff for said automobiles $256,519.10.

Couture Motor Corporation used said automobiles in its rent-a-car business which it conducted in Miami, Florida. It paid General Car Leasing $55 per month for each automobile and during the term of the lease paid General Car Leasing a total of $102,189.10. The rental for said automobiles commenced five days after each automobile left Detroit, Michigan. All of said automobiles were leased by General Car Leasing to Couture Motor Corporation for more than seven consecutive days. On December 19, 1956 defendant assessed and plaintiff paid upon the foregoing transaction sales taxes in the sum of $7,694.97 and interest thereon in the amount of $860.78, a total of $8,555.75.

On February 13, 1957 plaintiff commenced this action to recover said payment with interest at six per cent from the date of payment, which is authorized by Section 7.543, Statutes Annotated, alleging that said assessment was repugnant to the Constitution of the United States and particularly the Commerce Clause.

Under the state sales tax act a sale for leasing, when the rental receipts are taxable as provided in the use tax act, is exempt from the sales taxes. *Statutes Annotated, 7.521.* The use tax act provides a use tax of three per cent upon the rental receipts derived from the rental of

tangible personal property for seven consecutive days or more. *Statutes Annotated, 7.555.*

Defendant contends that, since General Car Leasing was not taxable upon the rental receipts, plaintiff is liable for the sales taxes as assessed in this case. Plaintiff contends that the sales taxes, as herein imposed, discriminate against interstate commerce and also expose interstate commerce to multiple burden and are, therefore, unconstitutional, being in violation of the Commerce Clause. The law is settled that a state may not expose interstate commerce to multiple burdens to which intrastate is not exposed, nor may it discriminate against interstate commerce. The issue in the instant case is whether or not interstate commerce is thus exposed to multiple burdens or whether it is discriminated against. If it is, plaintiff is entitled to a judgment as prayed for.

Michigan cannot constitutionally tax the rental receipts derived from the rental of automobiles in the State of Florida. Consequently, the rental received by General Car Leasing in this case is not taxable under the Michigan use tax act. The sales tax act exempts sales from sales tax when made for leasing provided the rental receipts are taxable under the use tax act. Since the rental receipts are not taxable in Michigan under the use tax act, the State contends and the sales tax act provides that the sales in the instant case are subject to Michigan sales taxes.

The United States Supreme Court on many occasions has held that any form of state taxation or regulation, whether forthright or ingenious, which exposes interstate commerce to multiple burdens or discrimination to which intrastate commerce is not exposed, is a violation of the Commerce Clause. *McLeod v. Dillworth,* 322 U. S. 327; *J. D. Adams Manufacturing Co. v. Storen,* 304 U. S. 307;

Gwin, White and Prince v. Henneford, 305 U. S. 434; *Michigan, Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157; *Memphis Steam Laundry Cleaners, Inc. v. Stone*, 342 U. S. 389; *Nippert v. Richmond*, 327 U. S. 416; *Best & Co. v. Maxwell*, 311 U. S. 454; *Hale v. Binco Trading Co., Inc.*, 306 U. S. 375; *I. M. Darnell & Co. v. Memphis*, 208 U. S. 113; *Walling v. Michigan*, 116 U. S. 446; *Weber v. Virginia*, 103 U. S. 344; *Guy v. City of Baltimore*, 100 U. S. 434; *Welton v. Missouri*, 91 U. S. 275.

The question to be determined is whether or not, under the facts of this case, interstate commerce is exposed to multiple burdens to which intrastate commerce is not exposed, or discriminated against.

A sale in Michigan for leasing in the State of Michigan, under the same circumstances as in the instant case, would not be subject to sales tax. A sale in Michigan for leasing beyond Michigan is subject to a sales tax under the act Thus a sale in Michigan for intrastate leasing is exempt from sales taxes and the same sale for interstate leasing is taxable. Plainly interstate commerce is discriminated against. A sale where interstate commerce follows is taxable. The same sale where intrastate commerce follows is not taxable. It, therefore, can not be argued that interstate commerce is not discriminated against.

The State contends there is no discrimination because a use tax is paid upon the rental receipts upon sales for intrastate leasing, and none is paid upon the rental receipts derived from interstate leasing. The State of Florida may impose a use tax upon the rental receipts derived from the rental of automobiles in the State of Florida. Then a sale in Michigan for interstate leasing would be subject to a sales tax in Michigan and use taxes upon the rental receipts in Florida, whereas a sale for intrastate leasing would be exempt from sales taxes and

subject only to use taxes upon the rental receipts. It is plainly apparent that a sale for interstate leasing is subject to sales tax and that such a sale for intrastate leasing is exempt from such tax.

The State further contends that interstate commerce is not exposed to multiple burdens or discrimination because the State of Florida imposes no use tax upon the rental receipts. The State of Florida may impose a use tax upon the rental receipts, and thus expose interstate commerce to multiple burdens which the Commerce Clause does not permit. The power of taxation is not dependent upon who exercises it first. *Gwin, White and Prince v. Henneford,* 305 U. S. 434.

The tax imposed in this case is also discriminatory in another manner. The State in this instance imposed a tax of $7,694.97. Had the lease been performed in Michigan the use tax upon rental receipts would have been $3,065.67. Thus a tax is here imposed in the sum of $7,694.97 (subject also to a Florida use tax, if any) because interstate commerce followed the sale, while the tax would have been only $3,065.67 if intrastate commerce had followed the sale. Here again interstate commerce is discriminated against in favor of intrastate commerce.

It must be held and the court does hold that the sales tax imposed in this case exposed interstate commerce to multiple burdens to which intrastate commerce was not exposed and that interstate commerce was discriminated against in favor of intrastate commerce, which the Commerce Clause does not permit. The assessment, therefore, was unconstitutionally made.

Defendant contends that the State of Michigan has the power to impose a sales tax upon a local sale. However, a state may not exercise its power of taxation in a manner

so as to expose interstate commerce to multiple burdens or discrimination to which intrastate commerce is not exposed.

In *I. M. Darnell & Co. v. Memphis*, 208 U. S. 113, the constitution and statute of the State of Tennessee exempted from property taxes the products of the soil of Tennessee in the hands of producers and their immediate vendees. Plaintiff operated a saw mill. Its inventory consisted of logs and lumber, part of which were the products of the soil of Tennessee and the remainder the products of the soil of other states. The assessor levied a property tax upon all of plaintiff's inventory which came from states other than Tennessee and exempted all of plaintiff's inventory which was the product of Tennessee.

It cannot be questioned that a state has the power to tax all property within its boundaries. However, when the State of Tennessee attempted to use its power of taxation so as to discriminate against interstate commerce, the Supreme Court held that the State of Tennessee could not exercise its power of taxation in such a manner as to discriminate against interstate commerce. The tax upon plaintiff's inventory which came from states other than Tennessee was held to be unconstitutional and void.

Likewise in *Guy v. City of Baltimore*, 100 U. S. 434, the Supreme Court held void an ordinance of the City of Baltimore which exacted wharfage fees for use of the public wharves by vessels carrying the products of states other than Maryland and exempted vessels using the wharves carrying products of the State of Maryland. It was not questioned that Baltimore had the right to exact wharfage fees upon all who used its wharves. It was held, however, that the city of Baltimore could not use its power in such a manner so as to discriminate against interstate

commerce and that said ordinance violated the Commerce Clause.

In *Jackson Mining Co. v. Auditor General,* 32 Mich. 488, a Michigan statute was held void which imposed a tax of 1½ cents per ton upon all ore mined, and further provided that all ore reduced or smelted in Michigan was exempt from such taxation. Justice Cooley held that the statute violated the Commerce Clause; that it discriminated against interstate commerce, in that it exempted the mining of ore from taxation when the ore was used in intrastate commerce and taxed the mining of ore when it was used in interstate commerce. Justice Cooley held that Michigan was powerless to impose a tax by reason of subsequent interstate commerce when it was not likewise imposed upon subsequent intrastate commerce. There is no doubt that the State of Michigan had the power to tax all mining; however, it could not exercise its power in a manner so as to discriminate against interstate commerce.

A judgment may be entered in favor of the plaintiff and against the defendant in the sum of $8,555.75, with interest at six per cent from December 19, 1956 until date of judgment, with costs.

APPENDIX "C"

Section 4, Act No. 272, Michigan Public Acts, 1949, (Michigan Statutes Annotated 7.524), which is the Section 4 referred to in Section 2, Act No. 272, Michigan Public Acts, 1949 (Michigan Statutes Annotated 7.524), provides:

> "In computing the amount of tax levied under the provisions of this act for any month, the taxpayer may deduct from the gross proceeds taxable under this act, the sum of $50.00. Every person exercising any privilege taxable hereunder for any fractional part of a month shall be entitled to a deduction of that part of the sum of $50.00 which bears the same proportion to the total sum that the period of time during which such person is engaged in such business bears to the whole month.
>
> "No person subject to a tax under this act need include in the amount of his gross proceeds used for the computation of the tax any proceeds of his business derived from sales to the United States, its unincorporated agencies and instrumentalities, any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States, the American Red Cross and its chapters and branches, and the state of Michigan or its departments and institutions or any of its political subdivisions."
>
> Michigan Public Acts, 1949, page 387.

Section 4a, Act No. 204, Michigan Public Acts, 1953, (Michigan Statutes Annotated Supp. 7.525), being the Section 4a referred to in Section 2, Act No. 272, Michigan

Public Acts, 1949, (Michigan Statutes Annotated 7.522), provides:

"No person subject to tax under this act need include in the amount of his gross proceeds used for the computation of the tax any sales of tangible personal property:

"(a) Not for resale, and when not operated for profit, to schools, hospitals, homes for the care and maintenance of children or aged persons, and other health, welfare, educational, charitable or benevolent institutions and agencies, operated by an entity of government, a regularly organized church, religious or fraternal organization, a veterans' organization, or a corporation incorporated under the laws of the state of Michigan, when the income from the operation does not inure, in whole or in part, to the benefit of any individuals or private shareholders, directly or indirectly: Provided, That in all such cases, at the time of the transfer of the tangible personal property, the transferee shall sign a statement, in a form approved by the department of revenue, stating that such property is to be used or consumed in connection with the operation of such institution or agency and that the said institution or agency qualified as an exempt entity under the provisions of this subsection. Such statement shall be accepted by all courts as prima facie evidence of the exemption and the said statement shall provide that in the event the claim for tax exemption shall be disallowed the transferee will reimburse the transferor for the amount of tax involved.

"(b) Not for resale to regularly organized churches or houses of religious worship, excepting such sales in activities as are mainly commercial enterprises.

"(c) To bona fide enrolled students of school books and food by schools or other educational institutions not operated for profit.

"(d) Not for resale to persons of catalogs, sales price lists, sales pamphlets or hand bills, commonly known as commercial advertising, when produced upon special order of the purchaser. All material used or consumed in the industrial processing of catalogs, sales price lists, sales pamphlets or hand bills, purchased by a printer, advertising agency, manufacturer or merchant, shall be exempt from payment of the tax effective July 1, 1949, the date when this subsection was last amended.

"(e) To persons of vessels designed for commercial use of registered tonnage of 500 tons or more, when produced upon special order of the purchaser, and bunker and galley fuel, provisions, supplies, maintenance and repairs for the exclusive use of such vessels engaged in interstate commerce.

"(f) To persons engaged in or having an interest in, as a business enterprise, and using or consuming said tangible personal property in the tilling, planting, caring for and/or harvesting of the things of the soil, in the breeding, raising or caring for livestock and/or poultry or horticultural products, including transfers of livestock and/or poultry or horticultural products for further growth: Provided, That in all such cases, at the time of the transfer of the tangible personal property, the transferee shall sign a statement, in a form approved by the department of revenue, stating that such property is to be used or consumed in connection with the production of horticultural or agricultural products as a business enterprise. Such statement shall be accepted by all courts as prima facie evidence of the exemption: Provided, That this exemption shall not be construed to include transfers of food, fuel, clothing or any similar tangible personal property for personal living or human consumption; Provided, further, That this exemption shall not be deemed to include tangible

personal property permanently affixed and becoming a structural part of real estate.

"(g) To persons for use or consumption in industrial processing: Provided, That the term 'industrial processing' shall not be deemed to include tangible personal property permanently affixed and becoming a structural part of real estate.

"(h) To persons of newspapers and periodicals, as admitted under present federal postal laws and regulations as second class mail matter or as controlled circulation publications or qualified to accept legal notices for publication in this state, as defined in Act No. 294 of the Public Acts of 1929, being sections 691.611 and 691.612 of the Compiled Laws of 1948, or any other newspaper or periodical of general circulation, established at least 2 years, and published at least once a week, whose total content shall consist of at least 20% local news matter, and copyrighted motion picture films. All materials used or consumed in the industrial processing of newspapers and periodicals which are exempt under this section, purchased by a printer, advertising agency, manufacturer or merchant, shall be exempt from payment of the tax effective May 8, 1950, the date when this subsection was added.

"(i) To persons licensed to operate commercial radio or television stations for direct use or consumption in processing commercial radio or television transmission."

Michigan Public Acts, 1953, page 288.

APPENDIX "D"

IN THE SUPREME COURT OF MICHIGAN

(Title Omitted)

ORDER OF THE SUPREME COURT OF MICHIGAN

December 2, 1958

The record and proceedings in this cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, and the same, and the grounds of appeal specified therein, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court, there is manifest error, therefore, it is ordered and adjudged that the judgment of said Circuit Court for the County of Wayne be and the same is hereby reversed and vacated, and that the defendant do recover of the plaintiff its costs, to be taxed, and have execution therefor, and that the cause be remanded to the Court below with directions to set aside the judgment in plaintiff's favor and to enter judgment for defendant.

APPENDIX "E"

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE, MICHIGAN

(Title Omitted)

JUDGMENT

January 15, 1959

This cause being before the court on motion for Full Summary judgment and it appearing that no sufficient affidavit of merits has been filed by the defendant and the court having heard the allegations of the plaintiff finds that the defendant did undertake as the plaintiff has complained against it and assesses the damages of the plaintiff against it and assesses the damages of the plaintiff at the sum of Nine Thousand One Hundred Four and 59/100 ($9,104.59) Dollars.

Therefore, it is adjudged that the plaintiff recover his damages assessed as aforesaid without costs.

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FILED
APR 2 1959
JAMES R. BROWNING, Clerk

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 756

DON McCULLAGH, INC., a Michigan corporation,
Appellant,

vs

STATE OF MICHIGAN, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the
State of Michigan

MOTION TO DISMISS

PAUL L. ADAMS,
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The Capitol
Lansing, Michigan

For Appellee

SPEAKER-HINES AND THOMAS, INC., LANSING, MICH.—1959

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In the
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October Term, 1958

No. 756

DON McCULLAGH, INC., a Michigan corporation,
Appellant,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the
State of Michigan

MOTION TO DISMISS[1]

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal of appellant from the judgment of the Supreme Court of Michigan, entered December 2, 1958, be dismissed on the grounds that (1) the question presented is so unsubstantial as to not warrant argument and (2) the appellant is not the proper party to raise any federal question.

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[1]
Numbers in parentheses will refer to pages of the Jurisdictional Statement, unless otherwise indicated.

OPINIONS BELOW

Citations to the opinions below are correctly set forth in the Jurisdictional Statement (1-2).

JURISDICTION

Appellant attempts to invoke jurisdiction of this Court under 28 U.S.C.A. § 1257(2). For the reasons set forth herein, the appeal should be dismissed.

STATUTES INVOLVED

Applicable provisions of the Michigan sales tax statute[2] and the Michigan use tax statute[3] involved in this appeal are summarized below for convenience:

Section 2[4] of the Michigan sales tax statute, as amended by Act No. 272 of the Michigan Public Acts of 1949, imposes a tax of three per cent on the gross proceeds derived from all persons engaged in the making of sales at retail in the state of Michigan, as defined in other parts of the statute.

---

[2]
Act No. 167, PA 1933, as amended by Act No. 204, PA 1953, effective June 10, 1953 [CL '48 §§ 205.51 et seq.; Henderson's Stat Ann §§ 7.521 et seq.].

[3]
Act No. 94, PA 1937, as amended by Act No. 203, PA 1953, effective June 10, 1953 [CL '48 §§ 205.91 et seq.; Stat Ann §§ 7.555 et seq.].

[4]
Mason's '54 Supp § 205.52; State Ann § 7.522.

Section 1(b)[5] of the statute, as amended by Act No. 204 of the Michigan Public Acts of 1953, includes within the definition of "sale at retail"

> "• • • any transaction by which is transferred for consideration the ownership of tangible personal property, when such transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any other purpose than for resale, *or for lease when the rental receipts are taxable under Act No. 94 of the Public Acts of 1937, as amended,* • • •." (Italicized portion added by Public Acts of Michigan 1953, No. 204, effective June 10, 1953.)

Act No. 94 of the Michigan Public Acts of 1937, as amended, referred to in the above quotation from § 1(b), imposes a Michigan use tax equal to three per cent of the price paid for the use of property in Michigan.

"Price" is defined in § 2(f)[6] of the use tax statute, as amended by Act No. 203 of the Michigan Public Acts of 1953, to mean

> "• • • the aggregate value in money • • • paid or delivered by a consumer to a seller in the consummation and complete performance of the transaction by which tangible personal property shall have been purchased *or rented* for storage, use or other consumption in this state • • •. *It is hereby provided*

---

[5]

Mason's '54 Supp § 205.51.

[6]

Mason's '54 Supp § 205.92; Stat Ann '57 Supp § 7.555(2).

that no tax is to be computed on rental receipts when the tangible personal property is rented or leased for a period that is less than 7 consecutive days, and in such instance, the lessor shall be deemed to be the consumer of the tangible personal property so rented." (Italicized portion added by Public Acts of Michigan 1953, No. 203, effective June 10, 1953.)

These above-referred-to provisions of the sales and use tax statutes are set forth verbatim on pp 4 and 5 of the Jurisdictional Statement.

Both the sales and use tax statutes provide for various deductions and/or exclusions. Subsections (a), (b), and (e) of § 4[7] of the use tax act, as amended by Act 203, PA 1953 [not reproduced in the Jurisdictional Statement and for that reason set forth here verbatim], exempt:

"(a) Property sold in this state on which transaction a tax has been paid under the provisions of Act No. 167 of the Public Acts of 1933, as amended, being sections 205.51 to 205.78, inclusive, of the Compiled Laws of 1948: *Provided, Such tax was due and paid on the retail sale to the consumer as consumer is defined in this act.*

"(b) Property, the storage, use, or other consumption of which, this state is prohibited from taxing under the constitution, or laws of the United States, or under the constitution of this state.

• • •

---

[7] Mason's '54 Supp § 205.94; Stat Ann '57 Supp § 7.555(4).

"(e) Property the sale or use of which has already been subjected to a sales tax or use tax equal to or in excess of that imposed by this act under the law of any other state of the United States: Provided, That if the sale or use of property has already been subjected to a tax under the law of any other state in an amount less than the tax imposed by this act, the provisions of this act shall apply, but at a rate measured by the difference only between the rate herein provided and the rate by which the previous tax was computed: *Provided, Such tax was due and paid on the retail sale to the consumer as consumer is defined in this act: Provided further, That the state in which the tax was imposed accords like or complete exemption on property the sale or use of which was subjected to the Michigan sales or use tax.*" (Italicized portions added by Public Acts of Michigan 1953, No. 203, effective June 10, 1953.)

Section 1(b) of the sales tax act prior to Act No. 204, of the Michigan Public Acts of 1953, did not contain the phrase "or for lease when the rental receipts are taxable under Act No. 94 of the Public Acts of 1937, as amended, * * *." This change in the sales tax act and the italicized changes in the use tax act were effective on the same day.

The simultaneous changes in § 1(b) of the sales tax statute and § 2(f) of the use tax statute subject gross receipts from the rental or lease of tangible personal property to use tax, if rented or leased for a consecutive period in excess of six days. To prevent the gross receipts paid in acquiring such property for such leasing purposes from being subject also to the sales tax, § 1(b) of the sales tax act was amended by Act No. 204 of the Michigan Public Acts of 1951, to exclude from the definition of a "taxable sale at retail" the sale of property which is

rented in such a manner that the rental receipts are subject to the use tax. In this manner, the statutory changes complement and supplement each other.

In order to carry out in the same manner the supplementary and complementary features of both the sales and use tax statutes and to prevent imposing a multiple burden on either domestic or foreign sales or use transactions, the use tax has always exempted, either directly or on a reciprocal basis, property which has been subjected to a foreign sales or use tax. Section 4(e) of the use tax statute, quoted above, provides for this exemption. Section 4(a) of the use tax statute, quoted above, provides a comparable exemption of property sold in this state.

Applicable provisions of the sales and use tax law of the state of Florida provide as follows [Florida Statutes Annotated, Title XIII, Chap. 212, § 212.06, ¶¶ (7) and (8)]:

> "(7) The provisions of this chapter shall not apply in respect to the use or consumption, or distribution, or storage of tangible personal property for use or consumption in this State upon which a like tax equal to or greater than the amount imposed by this chapter has been paid in another State, the proof of payment of such tax to be according to rules and regulations made by the Comptroller. If the amount of tax paid in another State is not equal to or greater than the amount of tax imposed by this chapter, then the dealer shall pay to the Comptroller an amount sufficient to make the tax paid in the other State and in this State equal to the amount imposed by this chapter.
>
> "(8) It is further specifically provided that the 'use tax' shall not apply to tangible personal property

> owned or acquired in this State, or imported into this State or held or stored in this State prior to November 1, 1949. But, the 'use tax' will apply to all tangible personal property imported or caused to be imported into this State on or after November 1, 1949, unless it appears that said property has previously borne a sales or use tax in another State equal to or greater than the tax imposed by this chapter."

In the instant case, the operative effect of § 4(e) of the use tax statute would be to exempt from the Michigan use tax, property or transactions which had been subjected to either the Florida sales or use tax.[8]

The Supreme Court of Michigan, in rendering its opinion below, has construed the Michigan sales and use tax statutes as being supplementary and complementary revenue measures to the end that property used and consumed within the state of Michigan would be subject to tax under either the sales tax, on retail acquisition, or the use tax, on subsequent use.

Banner Laundering Co. v. *State Board*, 297 Mich 419, 431

Western Electric Co. v. *Department of Revenue*, 312 Mich 582, 596

Kress v. *Department of Revenue*, 322 Mich 590, 593

McCullagh, Inc. v. *Revenue Dept.*, 354 Mich 413

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[8]

Florida Statutes Annotated, Title XIII, Chapter 212, § 212.06 [Florida's sales and use tax statute contains the same rate as the Michigan statutes and exempts property already subject to a sales or use tax of another state (subject to adjustment of differential in rates).]

This Court has so construed similar statutes.

Henneford v. *Silas Mason Co.*, 300 US 577, 583-584

Southern Pacific Co. v. *Gallagher*, 306 US 167, 172

General Trading Co. v. *State Tax Commission*, 322 US 335, 336-337

Nelson v. *Sears and Roebuck*, 312 US 359

This has consistently been the general interpretation of sales and use tax measures of the various states.

Hartman, "State Taxation of Interstate Commerce," Chap. VII, pp 163-172

53 Harvard Law Review 909 (1940) — "New Light on Gross Receipts Taxes", by Thomas Reed Powell

Law and Contemporary Problems, "Consumption Taxes," School of Law, Duke University, Vol. VIII (1941) pp 495-504, "The Future of Use Taxes," by Robert C. Brown

QUESTIONS PRESENTED

If any federal question has been properly raised and presented, the Jurisdictional Statement does not accurately state such question. If appellant is the proper party to raise a federal question, appellee believes the only possible federal question is as follows:

Does the Michigan sales tax act unconstitutionally discriminate against persons engaged in interstate commerce to the extent it defines "sales at retail" to include sales for consumption or use or for any other purpose than for resale or for lease when the rental receipts are taxable under the Michigan use tax act?

In addition, the appellee, by its motion to dismiss, raises the following issues:

1. Is a Michigan retailer (such as appellant) in a position to urge the unconstitutionality of § 1(b) of the Michigan sales tax statute on the grounds that it discriminates against those persons engaged in interstate commerce, as compared to those engaged in intrastate commerce?

2. Has a substantial federal question been presented?

STATEMENT OF THE CASE

Appellee does not accept appellant's statement of the case but believes it to be more accurately stated, in material part, as follows:

The Facts

Both Courts below recited substantially the same stipulated facts. The facts quoted from the Wayne County Circuit Court opinion on pp 7 and 8 and the first paragraph on p 9 of the Jurisdictional Statement are correct and are set forth in the opinion of the Supreme Court below (1a-3a; 354 Mich 413, 415-416). These facts are as follows:

Appellant is a Michigan corporation, selling automobiles in this state. It sold automobiles outright to another Michigan corporation which acquired them for purposes of leasing in the state of Florida. Sales tax due from the appellant to the state of Michigan, resulting from the sale of those automobiles, amounted to $7,694.97.[9] If the

[9] Interest of $860.78 increases the total in controversy to $8,555.75.

automobiles had been leased for use in Michigan under the same terms as the Florida lease, the rental receipts for a *year* would have resulted in a Michigan use tax of $3,065.67. The lease was renewable and there is no evidence in the record to show what the *total* rental receipts were from the use of the automobiles. Thus, the total amount of use tax payable, if there had been a Michigan, rather than a Florida, use is not known.

The Court below stated the case before it to involve the following:

> "The basic question involved in the case is whether the provision of the sales tax act of Michigan, above quoted, discriminates in the obnoxious sense of the term against interstate commerce. As noted, plaintiff's claim in this respect is based on the exemption from the payment of the tax if the sale is made for leasing and use in Michigan so that the rental receipts are taxable under the use tax act. Concededly a State may not impose a tax on interstate commerce, nor may it enforce legislation resulting in unjust discrimination. In determining whether such discrimination obtains by virtue of the legislative enactment here in question consideration may properly be given to the fact that the sales tax act and the use tax act are closely related, to such an extent that each may be said to be complementary to the other. Each is designed to raise revenue from taxation of the privilege of engaging in certain business transactions. That the legislature in the enactment of said statutes, and subsequent amendments thereto, had in mind the practical situation presented is obvious. The provision of the sales tax act here involved is an expression of such recognition, indicating that the general policy of the State was not to impose a double burden on the

bases of the taxes provided for by said acts. (4a-5a; 354 Mich 413, at p 418)

• • •

"In the case at bar it is apparent that the legislature in the enactment of the sales tax act and use tax act, and numerous amendments thereto, has sought to avoid the burden of both taxes being imposed on the same business transaction. The exemptions in each of said statutes clearly indicate such purpose. • • •" (10a; 354 Mich 413, at p 424)

"• • • The sales tax act and the use tax act are complementary. Their relation is such as to require recognition in each of the provisions and operation of the other. As before suggested, the Michigan legislature has acted accordingly in the attempt to work out a fair and just system. • • •" (11a; 354 Mich 413, at p 425)

It found that the Michigan sales and use tax statutes, being related and complementary revenue measures, did not discriminate against interstate commerce. The Court then concluded, on authority of cases such as

Gregg Dyeing Co. v. *Query*, 286 US 472 (quoted on pp 9a-10a; 354 Mich 413, at pp 423-424),

Henneford v. *Silas Mason Co., supra*, 300 US 577,

Southern Pacific Co. v. *Gallagher, supra*, 306 US 167, and

General Trading Co. v. *State Tax Commission, supra*, 322 US 335,

that the definition of "sale at retail" as contained in § 1(b) of the Michigan sales tax act was constitutional.

The appellee, in the Court below, urged that the appellant was not the proper party to raise any question about interstate commerce because it was not engaged in interstate commerce and, as a Michigan retailer, it could not be discriminated against. The lower Court determined that appellant had the right to challenge the validity of the statutory provision in question because the legal incidence of the sales tax fell on it as a retailer of personal property. *The lower Court did not find or determine that the appellant was entitled to raise any federal question as a person engaged in interstate commerce.*

REASONS FOR GRANTING THE MOTION TO DISMISS

1. The appellant is not in a position to raise a federal question on the ground that Section 1(b) of the Michigan sales tax violates the U. S. Constitution by discriminating against persons engaged in interstate commerce in favor of those persons engaged in intrastate commerce despite the ruling of the lower Court that said appellant was a proper party to raise the question of the construction or constitutionality of the Michigan sales tax because the legal incidence of the tax was imposed upon it.

The appellant in this cause is a Michigan retailer. It has sold tangible personal property at retail within this state. The Michigan sales tax statute requires that it pay a tax for this privilege equal to three per cent of the gross proceeds it derives therefrom, less certain exemptions, exclusions and deductions.

If the appellant has any right to be heard, it must be related to the question of whether or not it is entitled to exclude from taxable gross proceeds for sales tax purposes the proceeds received from sales of the automobiles in question. This principle is effectively stated by the court in the *Henneford* case, *supra*, 300 US 577, at p 583:

> "• • • The plaintiffs are not the champions of any rights except their own."

Or, as stated in *Duckworth* v. *Arkansas*, 314 US 390, 397, 398, in the concurring opinion of Justice Jackson:

> "• • • One who assails the constitutionality of a statute must stand on his own right to relief. • • •"

Certainly the appellant, as a retailer in this state, cannot claim that it is being discriminated against when all Michigan retailers are subjected in precisely the same manner to the sales tax statute. Appellant carries on all its activities in question in this state. It is a creature of Michigan law.

It therefore follows that the appellant has no standing to assert that the sales tax act in question discriminates against persons engaged in interstate commerce by unduly burdening that commerce.

2. A substantial federal question has not been presented.

The appellant urges that there is a substantial federal question involved (12-18). In such argument, it ignores the effect of decisions of this Court such as

Gregg Dyeing Co. v. *Query*, *supra*, 286 US 472, and

Henneford v. *Silas Mason Co.*, *supra*, 300 US 577,

as buttressed by a long line of decisions, including

> *Allied Stores of Ohio, Inc.*, v. *Stanley J. Bowers, Tax Commissioner of Ohio*, United States Supreme Court, decided February 24, 1959 (27 LW 4110),

concerning the question of discrimination as related to a state's power to tax.[10] Appellant also ignores the complementary and supplementary nature of the Michigan sales and use tax statutes by arguing against the constitutionality of § 1(b) of the Michigan sales tax statute while, at the same time, in asserting its "multiple burden" or "discriminatory" argument, it assumes that they are identical revenue measures.

Appellant completely misrepresents the effect of its argument. The practical effect of its argument, under the circumstances of this case, as found by the Court below, would be to free the Michigan sales transactions, as well as the subsequent Florida use, from both the Michigan sales tax and the Florida use tax. Appellant asks this Court to

---

[10]

See Also *Railway Express Agency v. Commonwealth of Virginia*, 27 LW 4136-4137 where Mr. Justice Clark wrote: "We believe that Virginia has eliminated the Commerce Clause objections sustained against its former tax law. While the tax is in lieu of other property taxes which Virginia can legally assess and should be their just equivalent in amount, *Postal Telegraph Cable Co. v. Adams*, 155 U.S. 688, 696 (1895), we will not inquire into the exactitudes of the formula where appellant has not shown it to be so baseless as to violate due process. *Nashville, C. & St. L.R. v. Browning*, 310 U.S. 362 (1940). The failure of the appellant to furnish, in its return, certain necessary information showing its gross receipts allocated to Virginia, called for under the statute and requested by the Commonwealth, has left the correct amount unobtainable by the latter except by some method of approximation and places the burden on appellant to come forward with affirmative evidence of extraterritorial assessment."

countenance such tax result and to render a provision of the Michigan sales tax act unconstitutional under the guise of discriminatory taxation. Yet, as a matter of fact, appellant's sole attempt is to avoid a local sales tax and thereby gain preference for interstate commerce (if we are to assume that interstate commerce is involved at all).

It is believed the basic error in appellant's contentions is illustrated by its relying upon cases such as *Jackson Mining Co.* v. *Auditor General*, 32 Mich 488, and, at the same time, ignoring the cases of *Gregg Dyeing Co.* v. *Query*, *supra*, 286 US 472, 473, and *Henneford* v. *Silas Mason Co.*, *supra*, 300 US 577, 583-584.

If, in the *Jackson* case, *supra*, Michigan had imposed a tax of one and one-half per cent per ton on sales of iron ore mined in this state, but had exempted such iron ore consumed in this state, and at the same time had imposed, as a complementary revenue measure, an equivalent use tax on iron ore consumed in Michigan, the case would have been analogous to the case at bar. There would also be a case which would clearly illustrate equality in tax treatment, rather than discrimination.[11]

---

[11]

Appellant's error is further manifested by its assumption that since the states referred to on p 13 of its Jurisdictional Statement impose taxes on rental receipts, the Michigan use tax statute is discriminatory. The fact that Ohio might impose a subsequent use tax does not establish discrimination [*Southern Pacific Co. v. Gallagher, supra*, 306 US 167, 172], and the Indiana statute referred to therein is a gross income tax statute and does not involve a use tax.

Arizona, Louisiana, New Mexico, Oklahoma and Mississippi exempt from their use tax statutes [Ariz. Rev. Stat. § 42-1409; La. Rev. Stat. 1950, § 305; N. M. Stat. 1953, § 72-17-4; Okla. Stat. 1951, Title 68, § 1310c, subsection (c); and Miss. Laws 1954, § 10146.04] any tangible personal property or rental receipts from leases of same,

It is believed the general rule applicable here was stated in

> *General American Tank Car Corp.* v. *Day*, 270 US 367, 373,

cited by the Court in *Gregg Dyeing Co.* v. *Query*, *supra*, 286 US 472, as follows:

> "• • • Where the statute imposing a tax which is in lieu of a local tax assessed on residents, discloses no purpose to discriminate against non-resident taxpayers,

---

when that personal property has been subjected to an equivalent sales tax.

Georgia and Tennessee have statutes [Ga. Stat. § 92-2150.10; and Tenn. Code § 67-3008] which provide the same type of exemption as that contained in the Michigan use tax statute.

It is not clear whether or not the ordinance of the City of New York and the statutes of Ohio and Rhode Island, under which rental receipts are taxed, are complementary revenue measures (i.e., exempting from use taxation, property which has been subjected to the sales tax). On the other hand, the state of Wyoming does not subject to a use tax, automobiles bought and registered in another state and subsequently used in Wyoming. [Opinion of the Attorney General of Wyoming, Nov. 15, 1951.]

Under its use tax statute, North Carolina treats rental receipts the same as does Wyoming, with the additional requirement that the property must be purchased from a retailer doing business both in North Carolina and in the out-of-state place of sale. [Opinions of the Attorney General of North Carolina, Sept. 28, 1946, and March 30, 1949.]

North Dakota has a reciprocity statute similar to that of Michigan, but excludes from its provisions the commercial use of motor vehicles which is purely intrastate. [Rule 116, N. D. Use Tax Stat.; paragraph 59-657 CCH All States Sales Tax Reporter.]

West Virginia and South Carolina do not tax the type of rental transaction such as the one at bar. [W. Va. Code, Chap. 11, Art. 15, § 6, subparagraph 6, and Art 15a, § 3; S. Car. Sales and Use Tax Reg. 11; paragraph 67-511 CCH All States Sales Tax Reporter.]

and in substance does not do so, it is not invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness. • • •"

The principles above enunciated were specifically applied to the sales and use tax field in *Henneford* v. *Silas Mason Co., supra,* 300 US 577. This case involved the constitutionality of a Washington use tax statute that exempted property which had been subjected to a sales or use tax of the same amount by another state.

In considering the problem of discrimination, the court stated at p 584:

"When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. • • • 'There is no demand in . . . [the] Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power.' *Gregg Dyeing Co.* v. *Query,* 286 U.S. 472, 480. If the sales tax were abolished, the buyer in Washington would pay at once upon the use. He would have no longer an offsetting credit. While the sales tax is in force, he pays upon the sale, and pays at the same rate. For the owner who uses after buying from afar the effect is all one whether his competitor is taxable under one title or another. This common sense conclusion has ample precedent behind it. • • •"

The principle enunciated in the *Henneford* case *supra*, was reaffirmed in the California use tax case of *Southern Pacific Co.* v. *Gallagher, supra,* 306 US 167, 172.[12]

This Court recently affirmed the general principle here applicable in

> *Allied Stores of Ohio, Inc.*, v. *Stanley J. Bowers, Tax Commissioner of Ohio, supra,* United States Supreme Court, decided February 24, 1959 (27 LW 4110),

in answer to an equal protection argument [which is the only federal question the appellant, as a Michigan retailer, could possibly raise]. This Court there stated:

> "• • • It [the State] is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Cases cited]
>
> 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the 14th Amendment was intended to assure.' [Case cited]
>
> • • •

---

[12] The general operative effect of the California sales and use tax statutes is akin to that of the state of Michigan. See statement of the same in Southern Pacific Co. v. Gallagher, supra, 306 US 167, 171.

"• • • Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. [Cases cited]" (27 LW 4110, 4111-4112)

The appellant here attempts to abort the good faith and effort on the part of the state of Michigan to require property, sold or used in this state (unless otherwise exempted), to respond to either its sales or use tax levy. The Michigan sales and use tax statutes are neither constructed nor intended to discriminate against interstate commerce. This is the plain, operative effect of the statutory language employed and is in accord with the express findings of the Court below.

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APR 15 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 756

DON McCULLAGH, INC., a Michigan corporation,
Appellant,
v.
STATE OF MICHIGAN, DEPARTMENT OF REVENUE,
Appellee.

Appeal from the Supreme Court of the State of Michigan

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

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IN THE

Supreme Court of the United States

October Term, 1958

No. 756

DON McCULLAGH, INC., a Michigan corporation,
Appellant,

v.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE,
Appellee.

Appeal from the Supreme Court of the State of Michigan

BRIEF IN OPPOSITION TO MOTION TO DISMISS[1]

The appellee, State of Michigan, Department of Revenue, has filed a motion to dismiss the appeal on the grounds:

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[1] Numbers in parentheses refer to pages of Jurisdictional Statement unless otherwise indicated.

(1) that the appeal does not present a substantial federal question and

(2) that appellant is not a proper party to raise any federal question.

STATEMENT OF THE CASE

This is an action against appellee to recover sales taxes in the sum of $7,694.97 (2a), paid by appellant upon the sale by it of 154 new automobiles to General Car Leasing, Inc., a Michigan corporation, which were purchased by General Car Leasing, Inc., for leasing to Couture Motor Corporation, a Florida corporation, for use in Couture Motor Corporation's rent-a-car business in Miami, Florida. The sale price was $256,519.10 and the sales tax was assessed at the rate of 3% (1a).

The Michigan sales and use tax acts provide that sales for leasing intrastate and leasing intrastate for seven consecutive days or more are exempt from sale taxes when the rental receipts are taxable. The tax upon rental receipts is 3%. Similar sales for leasing interstate and leasing interstate are subject to sales tax of 3% of the sale price. The total aggregate rental received by General Car Leasing, Inc., from Couture Motor Corporation was $102,189.10 (2a), and if Couture Motor Corporation had used said automobiles in Michigan instead of Florida, the total tax upon the sale and leasing would have been $3,065.67, calculated at the rate of 3% of the rental receipts payable by the lessor, General Car Leasing, Inc., as and when the rental was collected (17a), instead of $7,694.97, as assessed and paid by the vendor herein.

Appellee, in its motion to dismiss, says that the rental received by General Car Leasing, Inc., from Couture Motor Corporation is unknown. This contention was not urged in either of the lower courts. It is groundless. The stipulation of facts in paragraph 5 H provides:

> "That all of said motor vehicles were leased for a period longer than seven consecutive days by General Car Leasing, Inc. to Couture Motor Corporation, said rental commencing five days after the automobiles left Detroit, Michigan, and that Couture Motor Corporation paid General Car Leasing, Inc. upon the leasing of said automobiles the sum of $102,189.10. (Defendant objects to this subparagraph upon the grounds of immateriality and irrelevancy)."

The trial court found:

> "It (Couture Motor Corporation) paid General Car Leasing $55 per month for each automobile and during the term of the lease paid General Car Leasing a total of $102,189.10" (14a).

The trial court further said:

> "The tax imposed in this case is also discriminatory in another manner. The State is this instance imposed a tax of $7,694.97. Had the lease been performed in Michigan the use tax upon rental receipts would have been $3,065.67. Thus a tax is here imposed in the sum of $7,694.97 (subject also to a Florida use tax, if any) because interstate commerce followed the sale, while the tax would have been only $3,065.67 if intrastate commerce had followed the sale. Here again interstate commerce is discriminated against in favor of intrastate commerce" (17a).

The Supreme Court of Michigan found:

> "The rental was payable monthly, the aggregate amount so paid being $102,189.10" (2a).

Said Court further said:

> "In the case at bar the amount of the sales tax paid by plaintiff exceeds what the use tax would have been had it been payable in Michigan" (11a).

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court, on February 24, 1959, decided *Portland Cement Co. v. Minnesota*, 3 L. ed 2d 421, wherein the Court said at page 427:

> "Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 96 L. ed. 436, 72 S. Ct. 424 (1952); *Nippert v. Richmond*, 327 U. S. 416, 90 L. ed. 760, 66 S. Ct. 586, 66 S. Ct. 586, 162 A. L. R. 844 (1946), or by subjecting interstate commerce to the burden of 'multiple taxation,' *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 98 L. ed. 583, 74 S. Ct. 396 (1954); *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913, 117 A. L. R. 429 (1938). Such impositions have been stricken because the States, under the Commerce Clause, are not allowed 'one single-tax worth of direct interference with the free flow of commerce.' *Freeman v. Hewitt*, 329 U. S. 249, 256, 91 L. ed. 265, 274, 67 S. Ct. 274 (1946)."

Can it be contended that interstate commerce is not discriminated against and is not exposed to multiple burdens when

(1) no sales tax would have been assessed or payable by the appellant vendor if the lease had been an intrastate lease instead of an interstate lease;

(2) sales tax of $7,694.97 is imposed upon appellant which would not have been imposed if the lease had been intrastate instead of interstate; and

(3) no tax other than $3,065.67 would have been assessable to General Car Leasing, Inc., lessor, if the lease had been intrastate instead of interstate?

Appellee urges that appellant fails to raise a substantial federal question and cites as authorities for its conclusion:

General American Tank Car Corporation v. Day, 270 U. S. 367;
Gregg Dyeing Co. v. Query, 286 U. S. 472;
Heneford v. Silas Mason Co., 300 U. S. 577;
Allied Stores of Ohio, Inc. v. Bower, 3 L. ed 2d 480.

In *General American Tank Car Corporation v. Day*, 270 U. S. 367, it was held that a method of *ad valorem* taxation imposed upon non-residents which was different from that imposed upon residents did not violate due process or the equal protection clauses in the absence of a showing that it was discriminatory.

In *Gregg Dyeing Co. v. Query*, 286 U. S. 472, this Court sustained a non-discriminatory South Carolina statute which imposed a tax after interstate commerce had ended upon the use of gasoline brought into the state which tax was equal to the tax imposed upon locally produced gasoline. Chief Justice Hughes carefully pointed out that the tax in question was not at all discriminatory because of

the origin of the gasoline, inasmuch as locally produced gasoline bore the same tax burden.

Henneford v. Silas Mason Co., 300 U. S. 577, sustained the power of a state to impose a use tax upon the use of property brought into the state.

In *Allied Stores of Ohio, Inc. v. Bower*, 3 L. ed 2d 480, appellant, a resident of Ohio, challenged an Ohio statute which exempted from *ad valorem* taxes merchandise of a non-resident stored in the state, and subjected to said tax the merchandise of a resident stored within the state. It was held that appellant was a proper party to question the validity thereof under the equal protection clause, and that the statute did not violate the equal protection clause because it was a reasonable classification based upon the consideration that its purpose was to induce non-residents to locate their business within the state. The Court further pointed out that a non-resident could not be discriminated against under authority of *Wheeling Steel Corporation v. Glander*, 337 U. S. 562.

The aforementioned authorities do not sustain appellee's position. They do not sustain a discriminatory tax by reason of interstate commerce; namely, the imposition of sales tax upon sales for interstate leasing which is not imposed upon the same sales for intrastate leasing, nor do said cases sanction a tax 2½ times greater than that which would have been imposed if the leasing had been intrastate commerce instead of interstate commerce.

Appellee urges that the use tax is supplementary and complementary to the sales tax and it therefore should be sustained. This Court has held on many occasions that regardless of the name or characterization of the questioned statutes, they violate the commerce clause if in their practical application they discriminate against interstate

commerce or expose interstate commerce to multiple burdens. *Best & Co. v. Maxwell*, 311 U. S. 454 (15, 16).

Leasing of tangible personal property beyond state lines constitutes interstate commerce. *Benderup v. Pathe Exchange*, 263 U. S. 291.

There can be no question that a state may tax rentals derived from chattels rented within its boundaries.

Gregg Dyeing Co. v. Query, 286 U. S. 472;
Henneford v. Silas Mason Co., 300 U. S. 577;
Freeman v. Hewitt, 329 U. S. 249.

Appellee urges that because Florida did not tax the rental receipts, the Michigan statutes do not expose commerce to additional or multiple burdens in violation of the commerce clause. In so contending, appellee entirely ignores the discriminatory tax here imposed by reason of interstate leasing. If the leasing had been intrastate leasing, the tax imposed upon the lessor would have been $3,065.67, and no sales tax would have been imposed upon appellant, vendor. Because the leasing was interstate rather than intrastate, appellant is taxed $7,694.97.

The test as to whether or not commerce is exposed to additional or multiple burdens is whether another state could impose such a burden although it may not in fact have done so.

J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307;
Gwin, White and Prince v. Henneford, 305 U. S. 434;
Freeman v. Hewitt, 329 U. S. 249;
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157.

Each state is at liberty to determine its own tax policy without any interference by any other state. A state has no power to impose a tax because another state chooses not to impose such a tax. A state tax statute cannot stand the test of constitutionality upon the theory that another state has not imposed a like or similar tax which it had the power to impose. State statutes must stand or fall upon the power of the state to impose and are not in the lease dependent upon what another state has done. The absurdity of appellee's contention that because Florida has not imposed a tax upon rentals, interstate commerce is not exposed to multiple burdens becomes plainly apparent upon consideration of such a theory. According to appellee's theory, the tax would not violate the commerce clause if the state of actual rental did not tax the rental, but it would violate the commerce clause if the state of rental did tax the rental receipts. Thus, the leasing in New York City which does tax rental receipts derived from tangible personal property would violate the commerce clause and leasing in the State of New York which does not tax rental receipts would not violate the commerce clause.

The commerce clause protects the nation's commerce. It is not limited to protection of commerce of some of the States.

> *Freeman v. Hewitt*, 329 U. S. 249;
> *Wheeling Steel Corporation v. Glander*, 337 U. S. 562.

In *Freeman v. Hewitt*, 329 U. S. 249, this Court said at page 256:

> "It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the

transactions. If another States has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax might mitigate the obvious burden generally created by a direct tax on commerce."

This Court further said, at page 257:

"Many States, for instance, impose taxes on the consumption of goods, and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State. Such potential taxation by consumer States is but one factor pointing to the deterrent effect on commerce by a superimposed gross receipts tax."

Appellee urges that the decision in *Jackson Mining Co. v. Auditor General*, 32 Mich. 488, wherein a Michigan statute exempting from mining taxation all ore mined and reduced or smelted in Michigan was in violation of the commerce clause would have been different if there had been an equivalent use tax upon reduction or smelting. Appellee, in so urging, fails to note that states of reduction or smelting could likewise impose a like use tax upon reduction and smelting and thus interstate commerce would be exposed to multiple burdens. Furthermore, appellee, in

so urging, fails to take into cognizance that the tax here imposed was discriminatory in fact, because interstate commerce was involved.

It is quite obvious that the cases relied upon by appellee involving non-discriminatory taxes do not support the imposition of sales taxes upon sales for interstate leasing and leasing interstate and exempting from said sales taxes sales for intrastate leasing and leasing intrastate, nor do they support a tax 2½ times that which it would have been if the leasing had been intrastate instead of interstate.

APPELLANT IS A PROPER PARTY TO RAISE THE FEDERAL QUESTIONS

The Supreme Court of Michigan, in answering appellee's contention that appellant was not a proper party to raise the federal questions, said:

> "Appellant has questioned the right of plaintiff to challenge the validity of the statutory provision in question on the ground that it is not engaged in interstate commerce. However, the basic proposition at issue is the matter of discrimination, and the legal incident of the sales tax falls on the retailer of personal property. *Federal Reserve Bank of Chicago v. Department of Revenue*, 339 Mich. 587; *National Bank of Detroit v. Department of Revenue*, 340 Mich. 573; *United States v. City of Detroit*, 345 Mich. 601. Plaintiff paid the tax of which it now complains, and should be permitted to urge in court the invalidity of the statute requiring such payment. It is entiled to a determination on the merits. It does not appear that any person or corporation other than plaintiff can claim to have been prejudiced by the collection of said tax" (11a, 12a).

The tax here was imposed and assessed upon appellant. It was paid by appellant. Appellant is the champion of and stands upon its own right within the meaning of *Henneford v. Silas Mason Co.*, 300 U. S. 577 and *Duckworth v. Arkansas*, 314 U. S. 390. Appellant is a proper party to raise the federal questions. *Allied Stores of Ohio, Inc. v. Bower*, 3 L. ed 2d 480.

Appellee urges that appellee cannot claim discrimination because all Michigan retailers are subjected to a like tax. This begs the question. The question is not whether all retailers are subjected to the tax but whether the tax can be imposed on any retailer because it discriminates against interstate commerce and exposes said commerce to multiple burdens.

CONCLUSION

Appellant respectfully suggests that the federal questions are substantial and that appellant is a proper party to raise the federal questions.

Appellant respectfully requests that the motion to dismiss be overruled in all respects.

Respectfully submitted,

ANTHONY A. VERMEULEN,
Attorney for Appellant.